Supreme Court, U.S.
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No. 95-958

In the Supreme Court of the United States

OCTOBER TERM, 1995

GLADYCE E. NELSON, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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14 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed the decision of the Merit Systems Protection Board (MSPB) sustaining the decision by the Office of Personnel Management (OPM) that petitioner was not entitled to former spouse survivor benefits.

2. Whether the court of appeals correctly affirmed the MSPB's finding that OPM was not estopped from denying petitioner survivor benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published, but the judgment is noted at 48 F.3d 1238 (Table). The initial decision of the Merit Systems Protection Board (MSPB) (Pet. App. 3a-11a) is not reported. The final decision of the MSPB (Pet. App. 12a-22a) is reported at 59 M.S.P.R. 612.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1995. A petition for rehearing was denied on July 17, 1995. Pet. App. 23a-24a. On September 22, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 14, 1995. Pet. 2. The petition for a writ of certiorari was filed on December 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner's former husband, Joseph Nelson, retired under the Civil Service Retirement System (CSRS) in 1979. At that time, he was married to his first wife, Gertrude Nelson, and he elected to have his retirement annuity reduced to provide a survivor annuity for her. His first wife died in 1984 and his full annuity was restored. Pet. App. 4a-5a.

In September, 1986, Mr. Nelson married petitioner. Pet. App. 5a. On February 17, 1987, Mr. Nelson elected to have his retirement annuity reduced to provide a survivor annuity for petitioner. *Ibid.* Petitioner and Mr. Nelson were divorced in 1990. The April 24, 1990, court order entering judgment upon dissolution of the marriage purported to provide a survivor benefit, pursuant to the marital settlement, for petitioner after the divorce. *Ibid.* On September 14, 1990, the Office of Personnel Management (OPM) notified petitioner and Mr. Nelson that it had received a copy of the judgment of dissolution purporting to award petitioner a former spouse survivor annuity, that the judgment appeared to be a qualifying court order for purposes of the Civil Service Retirement Spouse Equity Act of 1984 (CSRSEA), Pub. L. No. 98-615, 98 Stat. 3195, and that OPM intended to honor that order such that petitioner would be entitled to a monthly annuity in the event that Mr. Nelson predeceased her. Pet. App. 5a; see C.A. App. 29-32.

In 1991, Mr. Nelson remarried again and elected to provide a survivor benefit for his third wife. Pet. 4; Pet. App. 6a. On June 10, 1992, OPM allowed Mr. Nelson to elect the full survivor benefit for his third wife. Pet. 4. At the same time, OPM sent a letter to petitioner informing her that OPM's initial assess-

ment was in error and that, in fact, she was not entitled to retain a survivor annuity after the divorce because the judgment of dissolution was not a "qualifying court order" within the meaning of the governing regulation, 5 C.F.R. 831.1704(d)(2)(iii)(B) (1991) (recodified at 5 C.F.R. 838.1004(d)(2)(iii)(B), see 57 Fed. Reg. 33,596-33,597 (1992)). Pet. App. 5a-6a. OPM stated that the order did not qualify because Mr. Nelson had retired before May 7, 1985, petitioner's marriage to Mr. Nelson terminated after May 7, 1985, and Mr. Nelson had not elected a survivor annuity for petitioner before May 7, 1985. *Id.* at 6a; C.A. App. 35.

On reconsideration, OPM reaffirmed its decision denying petitioner's application for a survivor annuity as a former spouse. Pet. App. 4a; C.A. App. 41-43. OPM relied on the text of the governing regulation, 5 C.F.R. 831.1704(d)(2)(iii)(B) (1991) (now 5 C.F.R. 838.1004(d)(2)(iii)(B)), which provided, in relevant part:

> (d) For purposes of affecting or awarding a former spouse annuity, a court order is not a qualifying court order whenever—
>
> * * * * *
>
> (2)(i) The marriage was terminated on or after May 7, 1985; and
>
> (ii) The employee * * * retired under CSRS before May 7, 1985; and
>
> * * * * *
>
> (iii) * * * (B) In the case of a post-retirement marriage, the annuitant had not elected to provide a survivor annuity for that spouse before May 7, 1985.

See C.A. App. 41-42. OPM stated that, under this regulation, petitioner was not entitled to survivor benefits after the divorce because Mr. Nelson had not elected to provide a survivor annuity for her before May 7, 1985. *Ibid.*

2. a. The Merit Systems Protection Board (Board) affirmed. In an initial decision (Pet. App. 3a-11a), an administrative law judge indicated that petitioner was entitled to a survivor annuity while she was Mr. Nelson's spouse. *Id.* at 7a. The judge held, however, that, upon divorce, petitioner was not entitled to a survivor annuity under 5 C.F.R. 831.613(b)(5) (1992) (recodified at 5 C.F.R. 831.631(b)(5), see 58 Fed. Reg. 52,882 (1993)), unless Mr. Nelson had elected to provide it to her after the divorce or she had a qualifying court order awarding it to her. Pet. App. 7a-8a. The judge found no evidence of an election and found that petitioner's court order did not qualify under the governing law. The administrative law judge relied, as had OPM, on 5 C.F.R. 838.1004(d) (formerly 5 C.F.R. 831.1704(d) (1991)), which provides that a court order is not a qualifying court order where the claimant's marriage to the retiree had terminated after May 7, 1985, the retiree had retired before that date, and the retiree had married the claimant after retirement but had not elected prior to May 7, 1985, to provide the claimant with a survivor annuity. Pet. App. 9a. The administrative law judge also cited 5 C.F.R. 838.802(b), which states:

> In the case of a retiree who retired under CSRS before May 7, 1985, a court order awarding a former spouse survivor annuity under CSRS is not a court order acceptable for processing unless the retiree was receiving a reduced annuity to

> provide a survivor annuity to benefit *that* spouse on May 7, 1985.

See Pet. App. 10a. The judge concluded that petitioner's entitlement to a survivor annuity terminated upon her divorce from Mr. Nelson. *Ibid.*

The administrative law judge also rejected petitioner's argument that OPM should be equitably estopped from denying her benefits because OPM is penalizing petitioner for the date of her marriage, over which she had no control. The judge ruled that, where monetary benefits are not otherwise permitted by law, the government cannot be estopped from denying those benefits because of equitable considerations. Pet. App. 11a, citing *OPM* v. *Richmond*, 496 U.S. 414 (1990).

b. The Board denied petitioner's petition for review, but reopened the case on its own motion and affirmed the initial decision as modified. Pet. App. 12a-22a. The Board noted that petitioner had "conceded that the regulations upon which OPM relied in its reconsideration decision, if applied literally, precluded it from honoring the court order." *Id.* at 15a. The Board rejected petitioner's arguments that the regulations should nevertheless not preclude her from receiving benefits.

The Board recognized that Congress enacted the CSRSEA in 1984 to authorize OPM to honor a court order that awards CSRS survivor benefits to the former spouse of an employee or retiree. See 5 U.S.C. 8341(h)(1). Prior to enactment of the CSRSEA, OPM had been authorized to honor only court orders that awarded certain portions of an annuity to a former spouse where the annuity was payable during the employee's lifetime. Pet. App. 17a-18a. Section

2(3)(A) of the CSRSEA changed the CSRS to provide that retirees could elect to provide a survivor annuity for a spouse married after retirement so long as the retiree had been married at the time of retirement, 5 U.S.C. 8339(j)(5)(C)(i). The right to receive such a survivor annuity by a spouse married after retirement would terminate upon a divorce from the retiree unless the spouse was entitled to a survivor annuity under the terms of a qualifying court order, 5 U.S.C. 8339(j)(5)(A), or an election by the retiree within two years of the divorce, 5 U.S.C. 8339(j)(3).

The Board held, however, that Congress did not intend that this statutory change in coverage "have universal application." Pet. App. 18a. Rather, Congress specified in Section 4(a)(1) of the CSRSEA that the amendments made by Section 2 of the Act would take effect on May 7, 1985, and would apply to a spouse only if the spouse were married to a retired employee as of that date. Pet. App. 18a-19a, citing 5 U.S.C. 8341 note (effective date of 1984 amendments).* Because petitioner did not marry Mr. Nelson until 1986 and Mr. Nelson had not elected to provide a survivor annuity for her before May 7, 1985, petitioner's right to receive a CSRS survivor annuity terminated upon her divorce from Mr. Nelson. Pet. App. 20a, citing 5 U.S.C. 8339(j)(5)(A). The Board also ruled that the government could not be estopped from denying petitioner the annuity to which she was not entitled

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* See CSRSEA § 4, 98 Stat. 3204, as amended by the Federal Employees Benefits Improvement Act of 1986, Pub. L. No. 99-251, § 201(a)-(c), 100 Stat. 20-23, Act of Oct. 27, 1986, Pub. L. No. 99-549, § 9, 100 Stat. 3065, Federal Employees' Retirement System Technical Corrections Act of 1986, Pub. L. No. 99-556, § 501, 100 Stat. 3139, and Act of Jan. 8, 1988, Pub. L. No. 100-238, § 127, 101 Stat. 1758.

as a matter of law. Pet. App. 21a, citing *OPM* v. *Richmond*, *supra*.

3. The court of appeals summarily affirmed. Pet. App. 1a-2a.

ARGUMENT

1. Petitioner contends (Pet. 5-19) that the Office of Personnel Management (OPM) misinterpreted the Civil Service Retirement Spouse Equity Act of 1984 (CSRSEA), Pub. L. No. 98-615, 98 Stat. 3195, as amended by the Federal Employees Benefits Improvement Act of 1986 (FEBIA), Pub. L. No. 99-251, § 201, 100 Stat. 20-23, codified in part at 5 U.S.C. 8331 *et seq.* In petitioner's view, OPM misapplied the exclusion for those who retired before the effective date of the CSRSEA and who then marry and divorce after that date. Petitioner contends that OPM's implementing regulations are invalid because they are an unreasonable interpretation of the statute. See Pet. 16-17, 19.

Congress provided that Civil Service Retirement System (CSRS) benefits are exempt from legal process, except as provided for by federal law. 5 U.S.C. 8346(a). As the Merit Systems Protection Board pointed out, OPM is therefore precluded from honoring the court order that Mr. Nelson's CSRS annuity continue to be reduced to provide survivor benefits to petitioner unless there is express statutory authority for such a reduction. See Pet. App. 16a.

Upon the termination of a marriage of a retired CSRS employee, a reduction in the retiree's annuity for the purposes of providing a survivor annuity for that spouse terminates unless the spouse is entitled, as a former spouse, to a survivor annuity under 5 U.S.C. 8341(h). 5 U.S.C. 8339(j)(5)(A); 5 C.F.R.

831.613(b)(5) (1992). Section 8341(h) provides that a former spouse may be entitled to such an annuity if expressly provided for in an election by the retiree or in the terms of a divorce decree. However, petitioner cannot qualify for a survivor annuity under Section 8341(h). That provision was added by Section 2(4)(G) of the CSRSEA and all amendments made by Section 2 are subject to Section 4(a)(1) of the CSRSEA, which states that those provisions

> shall take effect May 7, 1985, and shall apply—
>
> (A) to any individual who, on or after such date, is married to an employee or Member who, on or after such date, retires, dies, or applies for a refund of contributions * * *, and
>
> (B) to any individual who, as of such date, is married to a retired employee or Member.

5 U.S.C. 8341 note (effective date of 1984 amendments); see note *, *supra*. Because Mr. Nelson retired before May 7, 1985, petitioner is not included under subsection (A); because petitioner was not married to Mr. Nelson as of May 7, 1985, petitioner is not included under subsection (B). Although there are certain exceptions to Section 4(a)(1) of the CSRSEA, none of the exceptions authorizes a survivor annuity for a person in petitioner's circumstances. See Pet. App. 18a-19a & n.4.

The legislative history also makes clear that, while the FEBIA was designed to extend certain benefits to former spouses, the technical changes made by the FEBIA were not intended to apply to persons in petitioner's situation. The House Report accompany-

ing the FEBIA explained that the bill amended the CSRSEA

> to implement the committee's intent that the former spouse provisions contained in [the CSRSEA] be extended to those Federal retirees and their spouses *who, as of May 7, 1985, are married.*

H.R. Rep. No. 292, 99th Cong., 1st Sess. 8 (1985) (emphasis added). In the section-by-section analysis, the House Report specified:

> Section 3(d) of the bill amends section 4(a)(1) of the [CSRSEA] to provide that the Act shall apply to any individual *who, as of May 7, 1985, is married to a retired employee or Member.*

Id. at 9 (emphasis added). Because petitioner was not married to Mr. Nelson on May 7, 1985, the FEBIA's extension of former spousal benefits was not applicable to her or those similarly situated.

2. Petitioner contends (Pet. 19-20) that OPM should be estopped from denying her the requested benefits because it accepted the validity of her claim to the benefits for nearly two years and both she and Mr. Nelson relied on OPM's representation regarding the validity of the claim.

Because petitioner is not entitled to former spouse survivor benefits as a matter of law, OPM cannot be estopped from denying those benefits to her. If federal government employees "were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the [Appropriations] Clause reposes in Congress in effect could be transferred to the Executive." *OPM* v. *Richmond*, 496 U.S. 414, 426-428 (1990). Nor do the equities dictate

an award of benefits to petitioner in this case. Any deposit paid by Mr. Nelson to obtain the spousal benefit in reliance on OPM's representations was applied to the spousal benefits for his third wife.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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